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THE CONSTITUTIONAL POWER OF THE COURTS OVER ADMISSION TO THE BAR.

ON November 4, 1897, the Supreme Court of Illinois promulgated a new set of rules. Rule 39 provided for the appointment by the court of a State Board of Law Examiners, who were to conduct examinations in a prescribed list of subjects for admission to the bar, and certify to the court the names of successful candidates. This rule also raised the required period of study before examination to three instead of two years, and omitted the provision previously existing in the court rules, by virtue of which graduates of law schools organized under the laws of the State, upon presenting their diplomas were admitted without examination.

No exception was made in these respects in favor of students who had begun their studies before the adoption of the new rule.

As soon as the rule was published, organized efforts were made by law students and others to procure its alteration. An elaborate memorial was presented to the court on behalf of the law students who were affected by the change of rules. Later a joint resolution of the Legislature was obtained on January 25, 1898, which declared it to be "the sense of this Assembly," that the rule should be modified so as not to apply to such students. But the

court, intimating that the rule was framed in the interest of the people of Illinois, not of the law students, remained obdurate on the points of three years' required study and no admission without examination.

The same organization therefore procured the passage of an act, approved February 21, 1899, only one vote being cast against it in the Legislature, the material sections of which were as follows: —

"SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That no person shall be permitted to practise as an attorney or counsellor at law, or to commence, conduct, or defend any action, suit or plaint, in which he is not a party concerned, in any court of record within this State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor at law, and shall authorize him to appear in all the courts within this State, and there to practise as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice, and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State. No person shall be refused a license under this act on account of sex,[1] and every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act, notwithstanding any subsequent changes in said rules.

Provided, That to date of the 31st day of December, A. D. 1899, a diploma regularly issued by any law school, regularly organized under the laws of this State, whose regular course of law studies is two years, and requiring an actual attendance by the student of at least thirty-six weeks in each of such years, and showing that the student began the study of law prior to November 4, A. D. 1897, shall be received by the Supreme Court of this State, and a license of admittance to the bar shall thereupon be granted by the said court to the holder of such diploma; but every application for admission to the bar made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time by motion of some attorney of the said court, supported by the usual proofs of good moral character, and the production

[1] To this point the statute follows the law previously in force, 1 Starr and Curt. Ann. Ill. Stat., 2d ed., 489, ch. 13, § 1.

in the said court of such diploma, or satisfactorily accounting by the applicant for its non-production; and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant or some officer of the law school, or by both.[1]

"*Provided further*, That any student who has studied in a law office in this State for two years, or who for the period of two years has studied law part of such two years in a law office and part in the aforesaid law school, and whose course of studies began prior to November 4, 1897, shall be admitted to practice law, upon a satisfactory examination in the branches now required by the rules of the Supreme Court of this State, except that he shall not be required to present to the examining board any proof as to his preliminary general education by examination or otherwise."

In accordance with this act, a motion was made in the Supreme Court by Henry M. Day, and a large number of other persons, at its April Term, 1899, for admission to the bar upon presentation of their diplomas from law schools, organized under the laws of the State. The application was resisted, on behalf of the Chicago Bar Association, and after hearing argument for and against the motion, the court, Justices Phillips and Boggs dissenting, rendered its decision June 19, 1899, refusing the application on constitutional grounds.[2]

Chief Justice Cartwright delivered the opinion of the court. The part of the act which provides that "every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act notwithstanding any subsequent changes in said rules," was held to be prospective in its operation, under the rule that "a statute will be construed to have a prospective effect, if such a conclusion is permissible;" the court saying: "In this case no intention to make the enactment retrospective is expressed, but such an intention is clearly negatived by the attempt to legislate for those affected by the change already made under the form of a

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[1] This paragraph is drafted from what was Rule 47 of the Supreme Court of Illinois before November 4, 1897, changing "may be received" to "shall be received," and making the rule mandatory instead of permissive.

[2] The case is reported in 4 Chicago L. J. N. S. 288; 31 Chicago Legal News, 377. An application for a rehearing has been refused.

proviso. And, further, if the enactment were retrospective, students to be examined would go to the Appellate Court [under the former rules of the court], while the proviso sends them to the Examining Board. To hold it retrospective would make the proviso repugnant to it. The provision quoted, therefore, operates only as a rule for the future, and does not confer the rights claimed on this application."

The proviso expressly providing for admission on diploma was held unconstitutional upon two grounds. Upon the first, the language of the court is quoted entire, as it presents a neat illustration of what is popularly called "class legislation." The provision of the Constitution of Illinois cited by the court provides against the General Assembly's passing "local or special laws" granting to individuals "any special or exclusive privilege, immunity, or franchise whatever." No opinion was expressed upon the point suggested by counsel, that on account of its arbitrary classification this legislation was a denial of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States. Under the provisions of the act two persons of precisely the same qualifications as to studies pursued might present the same diploma at the same time; and one would be entitled to admission without examination, while the other would not.

"Concerning the proviso, however, as an enactment, it is clearly special legislation, prohibited by the Constitution, and invalid as such. If the Legislature had any right to admit attorneys to practise in the courts and take part in the administration of justice, and could prescribe the character of evidence which should be received by the court as conclusive of the requisite learning and ability of persons to practise law, it could only be done by a general law, and not by granting special and exclusive privileges to certain persons or classes of persons. (Constitution, art. 4, sec. 22). The right to practise law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue causes and to collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court. The law conferring such privileges must be general in its operation. No doubt the Legislature, in framing an enactment for that purpose, may classify persons so long as the law establishing classes is general, and has some reasonable relation to the end sought. There must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one having no just relation to the subject of the legislation. (Braceville Coal Co. *v.* The People, 147 Ill.

66; Ritchie *v.* The People, 155 id. 98; Gulf, Colorado, & Santa Fé E. R. Co. *v.* Ellis, 165 U. S. 150.) The length of time a physician has practised and the skill required by experience may furnish a basis of classification (Williams *v.* People, 121 Ill. 84), but the place where such physician has resided and practised his profession cannot furnish such basis, and is an arbitrary discrimination, making an enactment based upon it void. (State *v.* Pennoyer, 65 N. H. 113.) Here, the Legislature undertakes to say what shall serve as a test of fitness for the profession of the law, and plainly any classification must have some reference to learning, character or ability to engage in such practice. The proviso is limited, first, to the class of persons who began the study of law prior to November 4, 1897. This class is subdivided into two classes: first, those presenting diplomas issued by any law school of this State before December 31, 1899; and, second, those who studied law for the period of two years in a law office, or part of the time in a law school and part in a law office, who are to be admitted upon examination in the subjects specified in the present rules of this Court, and to this latter subdivision there seems to be no limit of time for making application for admission. As to both classes, the conditions of the rules are dispensed with, and as between the two, different conditions and limits of time are fixed. No course of study is prescribed for the law school, but a diploma granted upon the completion of any sort of course its managers may prescribe is made all sufficient. Can there be anything with relation to the qualifications or fitness of persons to practise law resting upon the mere date of November 5, 1897, which will furnish a basis of classification? Plainly not. Those who began the study of law November 4 could qualify themselves to practise in two years, as well as those who began on the 3d. The classes named in the proviso need spend only two years in study, while those who commence the next day must spend three years, although they would complete two years before the time limit. The one who commenced on the 3d, if possessed of a diploma, is to be admitted without examination before December 31, 1899, and without any prescribed course of study; while as to the other, the prescribed course must be pursued, and the diploma is utterly useless. Such classification cannot rest upon any natural reason or bear any just relation to the object sought, and none is suggested. The proviso is for the sole purpose of bestowing privileges upon certain defined persons.

"It is not a mere change of system at a given date, but it recognizes the change made, and the power of the court to make future changes subject to a certain restriction, and legislates for a particular class. Students who began before and after November 3, 1897, were pursuing their studies when it was passed, and those who began after that date and before December 31, 1897, would complete two years before December 31, 1899, but cannot enjoy its privileges."

The second and main ground upon which the proviso for admission was held unconstitutional was that it disregarded the constitutional division of the powers of government into legislative, executive, and judicial. The principle involved is therefore one applicable wherever this constitutional subdivision is made. The Constitution of Illinois (article 3) contains an express prohibition as follows: "The powers of the government of this State are divided into three distinct Departments, — legislative, executive and judicial; and no person, or collection of persons, being one of these Departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The court are careful to point out that the determination whether admission to practise law belongs to the judicial department of the government is not answered simply by showing the history of the subject in England, where the Legislature is not prevented by any constitutional restriction from exercising powers properly judicial; they say, "Whatever the English practice may have been, the question must be what the nature of the power is, and whether it is one which naturally pertains to the courts. If it is judicial in its nature the Legislature is expressly prohibited from exercising it. The history of the admission of attorneys in England, however, does not justify the claim that it is the exercise of the legislative function, but utterly refutes it." They point out that at common law there was no right to appear by attorney except by virtue of a special warrant from the King,[1] until by various acts of Parliament the privilege was made general.[2] A summary is given of the history of admission of attorneys as follows:—

"In 1292, Edward I. made an order by which he appointed the Lord Chief Justice of the Court of Common Pleas and the rest of his fellow Justices of that Court; that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill who might do service to his court and people, and those so chosen and no other should follow his court and transact the affairs thereof; the said King and his Counsel then deeming the number of seven score to be sufficient for that employment; but it was left to the discretion of the said Justices to add to that

[1] Maugham on Attorneys, p. 5; 1 Pollock & Maitland, History of English Laws, 1st ed., p. 190.

[2] The first general statute was that of Westminster II., c. 10, in the 20th year of Edward I. 1 Pollock & Maitland, 192, note.

number or diminish as they should see fit. (1 Pollock & Maitland, History of English Law, 194; Dugdale's Orig. Jurid. 141.) The profession of an attorney was placed under control of the judges, and the discretion to examine applicants as to their learning and qualification and to admit to practise was exercised from that day by the judicial department of the English government, and no legislation sought to deprive the court of the power in that respect, or to invest it in any other branch of the government. Parliament legislated upon the subject, but the legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness. The statutes always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons. The first of these acts was the 4 Henry IV., c. 18, passed in 1403. The attorneys had increased to the number of two thousand, and the act reciting that damages and mischiefs ensued from the great number of attorneys unlearned in the law, ordained and established that all attorneys should be examined by the justices, and by their discretion their names put in the roll, and the other attorneys put out by the discretion of said justices, and their masters for whom they were attorneys should be warned to take others in their places, so that in the meantime no damage nor prejudice should come to their said masters. (Maugham, Attorneys, Ap. 9.) In 1413, by the 1 Henry V., undersheriffs, sheriffs, clerks, receivers, and bailiffs were excluded from practising as attorneys, because 'the king's liege people dare not pursue or complain of the extortions and of the oppressions to them done by the officers of sheriffs.' In 1455, by the 33 Henry VI., c. 7, Parliament limited the number of attorneys for Suffolk, Norfolk, and Norwich, reciting that the number has increased more than eighty, 'Most of whom, being not of sufficient knowledge came to fairs, etc., inciting the people to suits for small treaspasses.' In 1606, by the 3 James I., c. 7, it was attempted to further regulate attorneys to the same end. (Maugham, Attorneys, Ap. 13.) Parliament did not, by any of these acts, undertake to determine the amount of learning which would qualify a person for admission. The courts from time to time made their rules regulating the admission of attorneys, and on occasion provided for the appointment of a committee or board of examiners. (Maugham, Attorneys, Ap. 14, 16.) Blackstone says (3 Com. 26), "'These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall. . . . No man can practise as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court; an attorney of the Court of King's Bench cannot practise in the Court of Common Pleas, nor *vice versa*. . . . So as early as the statute 4 Henry IV., c. 18, it was enacted that attorneys should be examined by the judges, and none

admitted but such as were virtuous, learned, and sworn to do their duty."

The court show that the admission of barristers by the Inns of Court forms no exception to the rule, that the control of admission was always in the judges, pointing out, that in case of a person whom the Inns refused to call to the bar, there was a remedy by appeal to the judges as visitors of all the Inns of Court, citing Boorman's Case, March, 177; King *v.* Gray's Inn, 1 Doug. 353; King *v.* Benchers of Lincoln's Inn, 4 B. & C. 855. In the United States courts, the control of admission of attorneys, it is stated, has been recognized from the beginning, and the doctrine consistently maintained, that the act of admission is judicial. Since attorneys are officers and members of the courts, the Legislature cannot deprive the courts of discretion as to whom they shall admit.

The only authority cited sustaining an act compelling the courts to admit on diploma[1] is disposed of as follows: —

"In that case, the Legislature enacted a statute admitting to practice on diploma of the Columbia College, and it was held that the act was valid. Counsel for applicants in this case contend that the subject is legislative and not judicial in its character and the act of admission is ministerial. Their chief reliance is that case of Cooper. The first question there considered by the Court of Appeals was whether the admission of attorney was a judicial proceeding. The Supreme Court had denied admission, and Cooper had appealed. It was suggested that the power of admitting attorneys was executive or administrative rather than judicial, and this objection, if well founded, would be fatal to the appeal. Upon a full consideration of that question, it was held that the admission of attorneys was a judicial proceeding and the exercise of an appropriate judicial function. The appeal was entertained on that ground. The power being judicial in its nature, our Constitution prohibits its exercise by the Legislature. The court based its decision upon the ground that although the appointment of attorneys had usually been intrusted in that State to the courts, and was judicial in its nature, yet it was not a necessary or inherent part of their judicial power, but was subject to legislative action, and had been derived from statute. In that State, the power to admit to practice was exercised before the Revolution by the Governor. By the Constitution of 1777 the appointment of attorneys was given to the courts, but the provision was dropped from the Constitution of 1846, which provided, 'Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts

[1] Matter of Cooper, 22 N. Y. 67.

of this State'. In view of the history of admission and this particular condition of affairs, the act was sustained. The consequences have been greatly deplored by eminent men abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed.

The court then point out that in their own practice they had never recognized the right of the Legislature by statute to force attorneys on the court, without examination, but from early times had acted upon their own rules on the subject.

The main argument of the applicants, that the statute was passed by the Legislature in the exercise of the "police power," was answered by the court as follows: —

"It may be readily admitted that such all-pervading power does, in some respects, reach the practice of the law, and gives to the Legislature some power concerning it. The Legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. They may prescribe reasonable conditions, which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the State. The proviso in this case bears upon its face no such object, but practically concedes the wisdom of a change in the rules, and that such change is in the public interest, and attempts to give particular persons the privilege of admission, based upon some fancied right accruing on account of the time when they commenced the study of the law. Parliament and the Legislature have always required that persons to be admitted should have certain qualifications and fulfil certain requirements. They have properly excluded persons whom they deemed unfit, but with the single exception above named in New York have not forced the admission of any one. It would be strange, indeed, if the court can control its own court-room and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers. . . .

"The function of determining whether one who seeks to become an officer of the courts and to conduct causes therein, is sufficiently acquainted with the rules established by the Legislature and the courts, governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court, so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualifications under such restrictions and limitations as may be properly imposed by the

Legislature for the protection and welfare of the public. The fact that the Legislature may prescribe the qualifications of doctors, plumbers, horse-shoers, and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question.[1] A license to such persons confers no right to put the judicial power in motion, or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision. It is our duty to maintain the provision of the Constitution, that no person or collection of persons, being one of the departments of the government, shall exercise a power properly belonging to another, and if the Legislature by inadvertence, as in this case, assumes the exercise of a power belonging to the Judicial Department, it should only be necessary to call their attention to the restraint imposed by the Constitution.

"Whatever may have been the propriety of the rule admitting the holder of a diploma issued by a law school to practice, in view of the law schools existing at its adoption, the rule had become an alarming menace to the administration of justice. The Legislature of New York, by the statute above referred to, only sought to admit the graduates of a great university who had been examined by eminent lawyers, but under our rule persons were admitted who had been only nominally in attendance for the stipulated period of time upon schools of a very different grade. There was no State supervision of law schools, and any person who saw fit could organize a law school, and, by advertising that the diplomas admitted to the bar, could obtain students. The language of the proviso, 'any law school regularly organized under the laws of this State,' is mere sound and means nothing. Anything in the form of a law school is regular so far as the laws of this State are concerned. In view of the disastrous consequences to the profession and the public, the rule by which it was only a step from the diploma mill to the bar was changed, and, in an effort to discharge a duty to the public, the general standard of admission was raised. That the change was a wise one, and that it will tend to promote the public welfare, is not denied by counsel for applicants, who desire to elevate the standard of the bar, and assure us that they sympathize with us in our efforts in that direction. It is conceded that when the rule was made, November 4, 1897, the court had full power to make it, and to fix the standard of admission. It was a valid rule of the court acting within its unquestioned jurisdiction, and the

[1] A board of medical examiners, in licensing practitioners, acts in an administrative, not a judicial, capacity. France *v.* State, 57 Oh. St. 1 (1897); 47 N. E. Rep. 1041, 1042.

question is whether the Legislature could rightfully encroach upon a power belonging to the Judicial Department and set aside the rule. The Constitution answers the question in the negative.

"The motion to admit the applicants by virtue of their diplomas is denied."

Justices Phillips and Boggs, dissenting, rely upon *dicta* in various Illinois cases, as showing that the court had hitherto considered itself as deriving its power of admission and disbarment of attorneys from statute. They approve the doctrine of Cooper's case, and conclude, "The control exercised by the Legislature being the exercise of a police power with reference to the subject-matter, cannot be held to be an impairment of judicial power, nor the assumption of such judicial power by the Legislature."

The very interesting account given by Pollock and Maitland of the origin of the legal profession[1] concludes as follows: "In Edward I.'s day it is that our legal profession first begins to take a definite shape. We see a group of counsel, or serjeants and apprentices on the one hand, and a group of professional attornies on the other, and both of them derive their right to practise from the King, either mediately or immediately."

It is interesting to notice that the ordinance of Edward I. of 1292, which although possibly not the first of its kind, is the oldest regulation we have been able to discover of the admission of attorneys as a professional class, comes to us from the date of the first Year Book.[2] The text, the substance of which is fully quoted by the court in its opinion, will be found in the Parliament Roll of 20 Edward I., No. 22,[3] also in Dugdale's Origines Juridiciales, c. 55,[4] and in Pulling's Order of the Coif.[5] According to Pulling this ordinance probably precedes the institution of the Inns of Court,[6] and the separation of the profession into attorneys and barristers.[7] It is noteworthy that the ordinance of Edward I. observes no distinction between these two classes. It treats attorneys and "apprentices *ad legem*" alike. Their admission is subject to the action of the judges in any case. It ought also to be remembered that the power over admission of both attorneys and

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[1] Vol. I, pp. 190–196, 1st ed. For a number of citations and valued suggestions upon the history of admission to the bar, I am indebted to Professor E. A. Harriman.

[2] 1 Poll. & Mait., 1st ed., 195.

[3] P. 84.

[4] 2d ed., 141.

[5] Am. ed., 111.

[6] Ib. 112.

[7] Ib. ch. iv.

barristers conferred on the judges, thus antedates the admission of barristers by the Inns of Court.

Lord Mansfield tells us later that this power of the Inns of Court was derived from the judges, and subject to their revision.[1] Chief Justice Doe has collected a large part of the learning on the subject of admission to the bar in Ricker's Case,[2] and concludes that the power of admission and disbarment of attorneys was inherent in the courts at common law.

The statutes passed by Parliament from time to time for the regulation of admission to the bar, some of which are cited by the court, are collected in the appendix to "Maugham on Attorneys." They have invariably been of a negative character, forbidding the admission of unfit or unworthy persons.

The English courts from time to time, by virtue of their own rules, without any legislation, regulated the admission and disbarment of attorneys. The various rules adopted from 1573 to 1704 are collected by Maugham.[3] Thus, for example, in Hilary Term, 1616, the court ordered that the number of attorneys be reduced, by the removal of the superfluous number, "wherein respect to be had that the most unfit and unskilful persons be removed."[4] In Michaelmas Term, 1654, a rule of the King's Bench and Common Pleas Courts provided for the appointment of a board of examiners.[5] In Trinity Term, 1793, a rule of court undertook to regulate admission to the bar.[6] The power of the courts to determine the matter of admission to the bar, which had been thus exercised for centuries, was clearly recognized by the statute 2 George II., chapter 23. By this act, which was passed in 1729, and which was in force with slight modifications at the time of the American Revolution, the judges were required to examine as to the fitness and capacity of persons seeking to become attorneys or solicitors, and if they were satisfied with the qualifications of candidates, then, and not otherwise, to admit them.[7]

The first Congress of the United States provided that parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as by the rules of

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[1] King *v.* Benchers of Gray's Inn, 1 Doug. 353, 354 (1780). See also King *v.* Benchers of Lincoln's Inn, 4 B. & C. 855, 858 (1825).

[2] 66 N. H. 207, 213; s. c. 29 Atl. Rep. 559, 562 (1890).

[3] Maugham on Attorneys, 15–20, App. xiv–xx.

[4] Ib. App. xiv.

[5] Ib. 19, App. xvi.

[6] Ib. 55.

[7] Ib. 57, App. 1.

the several courts shall be permitted to manage and conduct cases.[1]

The laws of Northwest Territory, July to December, 1792,[2] provided that from and after the first day of January, 1793, no person should be admitted or practise as an attorney in any of the courts of the territory unless he was a person of good moral character and well affected to the government of the United States and of this territory, and should pass an examination of his professional abilities, before one or more of the territorial judges.

The Indiana Territorial Act of September 17, 1807,[3] in force in Illinois by the Illinois Territorial Act of December 3, 1812,[4] required a license from "two of the judges of the General Court," and the verbiage of the act is mainly preserved in the Illinois act of February 10, 1818,[5] from which the first sentence in section 1 of the act of February 21, 1899, is taken.

It is reasonable to conclude, from an examination of the historical records, that for more than six hundred years it has been the practice of the courts to admit attorneys upon their own examination, and that at the time the Colonies separated from the mother country the power of examination and admission of attorneys was vested in the courts.

The fundamental question after all is, however, the nature of the attorney's office, and the relation in which he stands to the court. Perhaps the most interesting cases on this point are those in the Federal courts.

The state and congressional statutes of the reconstruction period immediately following the Civil War, which imposed test oaths upon attorneys as a prerequisite of practising in the courts, that the applicant, for example, had never voluntarily borne arms against the United States, compelled a very serious examination of the relation of the attorney to the court. Such statutes were sustained in the earlier cases of Cohen *v.* Wright[6] and *Ex parte* Yale,[7] but were ultimately and decisively overthrown by the Federal courts.

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[1] Act of Sept. 24, 1789, 1 St. at L. 92, 1st Session, c. 20, s. 35; 2 Wilson's Works (Andrews ed.), 247.

[2] (Phila., 1794), p. 40, chap. 10, sec. 1.

[3] 1 Laws of Illinois Territory, 58; Laws of Indiana Territory, 1807 (Vincennes), 162.

[4] Laws of Illinois Territory, 1st Session, p. 5 (Russellville, Ky., 1813).

[5] Laws of Illinois (Kaskaskia, 1819), p. 9.

[6] 22 Cal. 293, 319 (1863).

[7] 24 Cal. 241 (1864); 85 Am. Dec. 62.

One of the most interesting of the early cases was *In re* Shorter,[1] where an application was made for leave to practise in the Federal courts without taking the test oath prescribed by the act of Congress of January 24, 1865. In that case Busteed, District Judge, makes the following comment on the thirty-fifth section of the Judiciary Act of September 24, 1789,[2] to which we have just referred: —

"This act, it will be remembered, was passed shortly after the adoption of the national Constitution, and when the principles upon which it was founded were familiar to the minds of every statesman and politician. It was intended by the legislature to carry into effect that provision of the organic law which provides that 'the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time establish.' The thirty-fifth section of this act is a clear concession to the courts of exclusive jurisdiction over the subject of the admission of attorneys and counsellors to practise, and may, I think, be taken as an acknowledgment by Congress that this is a matter within the 'judicial power of the United States.' It is certain that the courts have uniformly acted upon this understanding, and until the passage of the law of January 24, 1865, — nearly eighty years, — Congress has not attempted to exercise any control over the subject."[3]

The court then quotes Chief Justice Taney, in *Ex parte* Secombe,[4] that, "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor, and for what cause he ought to be removed," and makes the following comment: "If Congress may, *ex mero motu*, exact that a man who has aided in the Rebellion shall thereafter be absolutely disqualified from practising law in the national courts, notwithstanding that he has been previously admitted under their rules, why may not Congress exact that a man shall be allowed to practise in those courts without any other qualification than having fought under the banners of the Republic? If the former may be decreed as a penalty, why not the latter as a reward? Where shall the power of the courts over the conduct and qualifications of attorneys end, and where the power of Congress begin? How shall the conflict of jurisdiction that might arise be settled? It must not be forgotten that Con-

[1] Fed. Cas. No. 12, 811 (1865).
[2] 1 Stat. L. 92.
[3] 22 Fed. Cas. pp. 18–19.
[4] 19 How. 9.

gress does not originate either the national courts themselves or the office, privilege, or franchise of an attorney and counsellor in those courts. If it did, I am not prepared to say that it could not annex such conditions to the enjoyment of the privilege as it might consider wise and just." On this and other grounds the court held the requirements of the test oath unconstitutional.

In the celebrated case of *Ex parte* Garland,[1] the Supreme Court of the United States held the same act of Congress unconstitutional upon other grounds. We quote from the opinion of the court[2] a passage relied upon by the Supreme Court of Illinois, as follows: —

"They [attorneys] are officers of the court admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has always been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such offices in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. (*Ex parte* Heyfron, 7 How. (Miss.) 127; Fletcher *v.* Daingerfield, 20 Cal. 430.) Their admission or their exclusion is not the exercise of a more ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission. (Matter of Cooper, 22 N. Y. 81.) Attorneys and counsellors, said that court, are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their oppointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

Illustrations of the attorney's peculiar relationship to the court are to be found in the power of the court to compel him to serve

[1] 4 Wall. 333. [2] P. 378.

poor persons gratuitously, and his privilege from arrest on civil process while attending courts. His admission is an act of *quasi* public character to which any person may object.[1] The discretion of the court in refusing admission cannot be controlled by mandamus.[2] In the case of *Ex parte* Secombe,[3] the Supreme Court refused to grant a mandamus to the judges of the Supreme Court of Minnesota Territory, to compel them to reinstate Secombe as an attorney of that court. Chief Justice Taney, speaking for the court, said, "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to annul its decision, where the decision was in its nature a judicial act within the scope of its jurisdiction and discretion." If, as the decisions generally agree, in admitting an attorney the court acts judicially, this would seem to be an end of the controversy, for manifestly the Legislature cannot, without usurping judicial power, bind the court in advance to decide the case a certain way.

An interesting case upon the general question is Petition of Splane.[4] In this case Splane relied upon the act of May 7, 1885, providing that any attorney or counsellor at law who should "have been duly admitted to practise in any Court of Common Pleas and in the Supreme Court of this Commonwealth shall be admitted to practise in any other court of this Commonwealth upon motion simply, by exhibiting to the court (1) a certificate of admission to the Supreme Court, and (2) filing a certificate of the presiding judge of the county or district from which he came, setting forth that he is of reputable professional standing and unobjectionable character."[5]

The court was of the opinion that the petitioner had not presented a certificate from the presiding judge of the proper county or district, and that the act contemplated the county or district in which the attorney had last practised. The act provided in terms, that the court *shall* admit attorneys in the cases there recited; but the court do not base their opinion upon non-compliance with the terms of the act alone. After pointing out that in the admission of an attorney the court acts not ministerially, but judicially, they say: —

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[1] *Ex parte* Walls, 73 Ind. 95, 106 (1880); *In re* Burchard, 27 Hun, 429, 437 (1882).
[2] Commonwealth *v.* Judges, 1 S. & R. (Pa.) 187 (1814).
[3] 19 How. 9, 13, 15 (1856).
[4] 123 Pa. St. 527, 540 (1889); s. c. 16 Atl. Rep. 481; 23 Wkly. Notes Cas. 154.
[5] 123 Pa. St. 532.

"If there is anything in the Constitution that is clear beyond controversy, it is that the Legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a co-ordinate department of the government. The executive and legislative departments can no more encroach upon the judicial department than the latter can encroach upon them. Each department, in our beautiful system of government, has its own appropriate sphere, and, so long as it confines itself to its own orbit, the machinery of government moves without friction. . . . We are clearly of opinion that the act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government." [1]

The constitutional question is suggested, but not decided, in Goodell's case,[2] where a woman applied for admission to the bar, and a very strong intimation is given that the court would not submit to a statute requiring them to admit persons whom they considered improper. In the same volume of reports they refused to obey a statute requiring them to admit non-residents as attorneys.[3]

The judicial nature of the act of admission is brought out still more clearly by its converse, the act of disbarment, which is a part of the same power. It is manifest that the power of the court to disbar is taken away when its power over admission is destroyed. Of course it is possible for the Legislature to make disbarment a punishment for an offence, and the courts will enforce it accordingly; but this does not militate against the doctrine that the courts have an inherent power to disbar. This power follows from the fiduciary nature of the attorney's relation to the court, and Chief Justice Doe is probably justified in concluding, in his admirable discussion of the history and nature of the attorney's office, the power existed at common law.[4] The earliest general statute upon the subject of disbarment summarized in Chief Justice Cartwright's opinion, treats disbarment as part of the same subject as admission.[5]

The power to disbar has been said by the Supreme Court of the

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[1] It has been held that the acceptance by the court of a surety on a judicial bond is a judicial act, and the Legislature has no power to compel the court to accept certain corporations as sole surety. *In re* American Banking and Trust Company (Orph. Ct.), 17 Pa. Co. Ct. R. 274, 280 (1895); 4 Pa. Dist. R. 757; 26 Pittsburg L. J. N. S. 213; 37 W. N. C. 297.

[2] 39 Wis. 232, 239 (1875).

[3] *In re* Mosness, 39 Wis. 509, 511.

[4] Ricker's Case, 66 N. H. 207, 213, 214; S. C. 29 Atl. Rep. 559, 562 (1890). In that case an unmarried woman was admitted to be an attorney.

[5] 4 Hen. IV. c. 18, sects. 1, 2 (1402); 2 Pickering's St. at Large, 438.

United States to be possessed by all courts which have authority to admit attorneys to practise.[1] It exists independent of any rule or statute.[2] The powers of admission and disbarment are necessarily inseparable, and equally inherent in courts of justice.

In the case of Randall *v.* Brigham,[3] the Supreme Court of the United States, speaking through Mr. Justice Field, held that an action for damages would not lie against a judge for disbarring an attorney; and the court say, "Both the admission and removal of attorneys are judicial acts." Other cases to the same effect are collected in Weeks on Attorneys, 2d ed. 157, where the same reason is given.

The power of the Legislature over the courts in judicial matters is exceedingly limited, and can in no way be exercised so as to impair the independence of the judiciary. Perhaps the leading case upon this subject is that of Houston *v.* Williams, 13 Cal. 24 (1859),[4] in which the court refused to give the reasons of its decisions in writing, although so required by statute. In like manner the Legislature cannot, in the absence of constitutional provisions so authorizing, limit or restrict the inherent power of courts to punish for contempt.[5] This doctrine has recently received a most emphatic confirmation in an elaborate opinion by the highest court of the State of Virginia, in the case of Carter *v.* Commonwealth,[6] in which the court say: —

"Reading the constitution of the State in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusion: That in the courts created by the constitution there is an inherent power of self-defence and self-preservation; that this power may be regulated, but cannot be destroyed or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury."

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[1] *Ex parte* Robinson, 19 Wall. 505, 512 (1873).

[2] Weeks on Attorneys, 2d ed., 154; 3 Am. & Eng. Enc. Law, 2d ed., 300; State *v.* Judge, 49 La. An. 1015, 1018 (1897); Moutray *v.* People, 162 Ill. 194, 197 (1896).

[3] 7 Wall. 523, 535 (1868).

[4] Followed in Vaughn *v.* Harper, 49 Ark. 160; 4 S. W. Rep. 751 (1887). See also *Ex parte* Griffiths, Reporter, 118 Ind. 83 (1889); 10 Am. St. Rep. 107; 3 L. R. A. 398, acc.

[5] *In re* Shortridge, 99 Cal. 526, 532; 34 Pac. Rep. 227; 37 Am. St. Rep. 78 (1893); 6 A. & E. Enc, Law, 2d ed., 104, citing numerous cases.

[6] 32 S. E. Rep. 780, 785 (March 16, 1899).

The appointment of assistants to the courts in their judicial *duties* cannot be controlled by the executive or Legislature. A powerful statement of this doctrine will be found in the case of State, *ex rel.* Hovey, *v.* Noble,[1] in which the Supreme Court of Indiana held that an act providing for the appointment by the Legislature of commissioners to assist the Supreme Court was unconstitutional. The court say, in the course of the opinion: —

"A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. If it must accept as (ministers and assistants), as Lord Bacon calls them, persons selected for them by another department, then it is dependent on the department which makes the selection. To be independent, the power of the judiciary must be exclusive, and exclusive it cannot be if the Legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants to share with the governing power its functions and duties, the latter kingdom is in no sense independent. . . .

"It is, however, unnecessary to multiply authorities, for it cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as assistants to the judges in the performance of their judicial functions, whether they be referrees, receivers, attorneys, masters, or commissioners."

The control by the Legislature of admission to the bar, so far as it exists under the usual American constitutions, is at most a power to prevent the admission of unsuitable persons. It may be that the Legislature, within reasonable limits, can provide who shall not be admitted to the bar, provided they do not transgress other constitutional limitations besides the one dividing the powers of government, but the Legislature certainly has no positive power to compel the courts to admit persons to practise before them. Indeed, the true rule as to the limit of the legislative power in the matter of attorneys would seem to be much the same as in cases of contempt proceedings. The Legislature may regulate such proceedings, so long as it does not impair the power or the authority of the courts to protect themselves and maintain their efficiency and independence. Actuated by motives of courtesy to a co-ordinate branch of the government,[2] the court will regard reasonable

[1] 118 Ind. 350, 356, 357, 360 (1888).

[2] Compare Goodell's Case, 39 Wis. 232, 239 (1875).

enactments regulating admission of attorneys. But the moment the Legislature by a law, couched in whatever form, negative or affirmative, forbids the court to inquire into the merits of the applicant, or impairs the power of the court to control its own officers, the members of its bar, resistance to such a law becomes the duty of every self-respecting court.

The clause providing for admission on diploma in the Illinois act of February 21, 1899, seems to be an assumption by the Legislature of judicial power, not only because it forces the admission of certain described persons on the court as officers, but also because of the way the act goes about it, since the diploma is in effect made conclusive evidence of the intellectual qualification of the applicant, and the court is not permitted to inquire into the actual fact. On producing this diploma, and the usual proofs of good moral character, the court *shall* thereupon grant the license. "The Legislature cannot indirectly dispose of cases by prescribing conclusive rules of evidence." [1]

An interesting case on this question is that of Wantland *v.* White,[2] in which the act of Congress providing that the oath of enlistment taken by the recruit shall be conclusive as to his age, was declared unconstitutional. The court say: "It has been held, and it would seem that the decision must be correct, that it is unconstitutional for the legislative power to declare what shall be conclusive evidence, and in fact such declaration would seem to be a judicial act in each given case." In this case the guardian was allowed to recover his ward, who had taken the oath of enlistment under age.

In the case of United States *v.* Klein,[3] the Supreme Court had occasion to consider an act of Congress which provided that under certain circumstances the acceptance of a pardon from the President should be taken and deemed in suits in the Court of Claims, and an appeal therefrom, "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." The court says, by Chief Justice Chase, "In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect of evidence which, in his own judg-

[1] 6 Am. & Eng. Enc. of Law, 2d ed., 1050; Cooley's Principles of Constitutional Law, 3d ed., 46.

[2] 19 Ind. 470, 472 (1862). For this citation I am indebted to Professor J. H. Wigmore.

[3] 13 Wall. 128, 146, 147 (1871), 20 L. Ed. 519.

ment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." (The dissenting opinion goes upon other grounds.) It has been intimated, however, that the Legislature has power to make evidence which logically tends to prove a certain proposition, conclusive on the court,[1] although the case itself by no means called for such strong doctrine.

It is surprising how few cases upon statutory rules of evidence present the bare question of the line of demarcation of the judicial power, although there are many where the question is involved along with other constitutional limitations, such as the deprivation of property without due process of law.[2]

In the matter of Cooper,[3] the court (Chief Justice Comstock dissenting), upon an *ex parte* hearing, overruled a unanimous decision of the Supreme Court,[4] which had refused admission to the bar to parties presenting law-school diplomas. The case holds that attorneys are officers of the court, and that their admission is a judicial act,[5] and disposes in short order of the fundamental objection that the diploma is made conclusive evidence, as follows: "There are, no doubt, some restrictions upon the power of the Legislature to prescribe rules of evidence, as otherwise it might subvert some of the most valuable guaranties contained in the Constitution. These restrictions have never been judicially defined, but they clearly do not reach the present case."[6] The elaborate brief of Professor Dwight in this case contains much of the ancient learning on the subject, but the brief is naturally not conceived in a judicial spirit, and is quite as interesting for what it omits, as for what it contains. The power of the judges to give a remedy to a person properly qualified for the bar, who had been rejected by the Inns of Court, is never mentioned; nor was the attention of the court called to the fact that the earliest acts of Parliament upon the subject do not confer, but restrict, the judges' power to admit.[7] It was very unfortunate that the case was argued only on one side;

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[1] *In re* County Seat of Linn County, 15 Kan. 500, 528 (1875), opinion by Brewer, J.

[2] See, for example, Marks *v.* Hanthorne, 148 U. S. 172, 182 (1892).

[3] 22 N. Y. 67 (1860); 11 Abb. Pr. 301.

[4] Reported in 10 Abb. Pr. 348; 31 Barb. 353; 19 How. Pr. 97, 136.

[5] 22 N. Y. 84.

[6] 22 N. Y. 93.

[7] *E. g.* 15 Edw. 2 Stat. Carlisle, c. 1 (A. D. 1322); Maugham, Attorneys, App. viii.

and when the court below found out what had happened in the Court of Appeals, they protested against the way in which a reversal of their judgment was obtained, without notice to any one.[1] Professor Dwight's argument is misleading where he asserts that the discretion of the Inns of Court in admitting barristers is uncontrollable. The authority he cites (King *v.* Benches of Lincoln's Inn[2]) does not support this proposition, but intimates plainly that there is a remedy by appeal to the twelve judges, in their capacity as visitors. And undoubtedly this remedy existed.[3]

Dugdale's "Origines Juridiciales" abounds with instances of the orders of the judges in their capacity as visitors of the Inns of Court, — sometimes purporting to be by command of the King, or King and Council,[4] sometimes assented to by the benches of the Inns,[5] but frequently by the judges of their own motion and authority; as, for example, in the 33d year of Elizabeth (1591), regulating the readings,[6] in 1627, for the government of the readers,[7] and in the first year of Queen Elizabeth (1558), on All Souls Day, we find such orders regulating apparel, including the interesting provision, "that no fellow of those Societies should wear any Beard above a fortnight's growth."[8]

The act in question in Cooper's case is to be found in New York laws of 1860, p. 342, and was passed on April 7 of that year. It provided for an examination in every case by a committee of three lawyers before a diploma was granted.

In justice to the New York court, it ought to be said that very likely they construed the act as making the diploma not conclusive, but only competent, evidence.[9] The matter in New York was also complicated by the peculiar provision in that State in the Constitution of 1846, which took away the power of the judges to appoint attorneys conferred by the Constitution of 1777. The court said,[10] "Whenever an applicant is found to possess the requisite qualifications, the constitution, by its own inherent energy, appoints, *i. e.*, it gives the applicant an absolute title to the office, which is equiv-

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[1] 20 How. Pr. 17; 11 Abb. Pr. 301, 337.

[2] 4 Barn. & Cress. 855, 858, 859, 861 (1825).

[3] King *v.* Benchers of Gray's Inn, 1 Doug. 353, 354 (1780); Boorman's Case, March, 177 (1666).

[4] *E. g.* at pp. 312, 317, 320, 322 (2d ed. A. D. 1671).

[5] *E. g.* at pp. 313, 316.

[6] P. 313. [7] P. 319. [8] P. 311.

[9] 22 N. Y., p. 93. Cf. Matter of Burchard, 27 Hun, 430, 434.

[10] Ib., p. 94.

alent to an appointment." If this is true, it seems fair to say that the common-law discretion of the judges in admitting to the bar, which exists under the normal American constitution, did not then exist in New York. The unfortunate results of the decision in *Ex parte* Cooper, in the way of special legislation admitting to the bar on diploma, may be found set forth in the Matter of Burchard [1] and the reports of the New York State Bar Association.[2]

The practice of admitting to the bar without examination, upon production of a diploma from a law school, is said still to exist by law in Alabama, Georgia, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and Wisconsin.[3] The decision of the Illinois Supreme Court goes no further than to hold that a statute requiring such admission is unconstitutional.

If the examinations in any State are of such quality that a diploma is more trustworthy than the certificate of the examiners, there is no constitutional objection to a court's admitting *in its discretion*, on diploma, or admitting on no evidence at all. Deliberate attempts by the Legislature to alter the rules of the Supreme Court on this subject, such as occurred in Illinois, are fortunately rare. But it ought to be clearly understood that the responsibility of admission is in all cases upon the courts, not the Legislature, and a legislative disregard of constitutional limitations ought not to be encourged by an excess of judicial courtesy. A court would certainly best consult its dignity, and facilitate its own labors as well as protect the public, by requiring unquestionable proof of a high standard of attainment from all who seek admission to its bar.

Blewett Lee.

CHICAGO, September 5, 1899.

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[1] 27 Hun, 429, 438 (1882).

[2] Vol. 4, p. 50; vol. 5, p. 71.

[3] Proceedings Illinois State Bar Association, 1898, p. 134.